The defendants, respondents, do not deny that the whole estate was put up for sale, but they contend that they and Akburnissa have been placed by the settlement in the relation of mâlgoozaree and subordinate proprietors as contemplated by Section 10 of Regulation VII of 1822, and that their holdings are protected by Clause 8 of that Section. This was one of the contentions of the defendants in the first Court, and the Moonsiff thought that it was right.

I also think that this contention is well founded. It is true that this Regulation was originally in force only in the ceded and conquered provinces, the district of Cuttack, and the pergunnah of Puttaspore; but by Section 2 of Regulation IX of 1825 the major portion of the provisions of the Regulation of 1822 are extended "to all lands "(including jagheers, mokurrurees, and other "tenures, held free of assessment, or at "a quit-rent under special grant) not in-"cluded within the limits of estates for "which a permanent settlement has been "concluded in the manner prescribed by "Regulation VIII of 1793, and Regulations "II and XXII of 1795 as far as the same "may be applicable."

It seems to me clear that the land now in dispute is land which falls within the description of that Section. It could not have been included within the limits of an estate for which a permanent settlement had been concluded, otherwise, if the land had been resumed at all, the settlement would have been made with the proprietor of that estate. I understand the settlement with the lakherajdar to proceed on the assumption that he is recognized as proprietor though liable to assessment (see Regulation XXXVII of 1793, Section 6.) And indeed, unless the land now in dispute fell within the description of Section 2 of Regulation IX of 1825, no such settlement as was made in this case would have been possible. The appellants admit that this settlement was in fact made under the provisions of Clause 3 of Section 10 Regulation VII of 1822.

The question, then, will be whether Clause 8 of Section 10 is one of the provisions which are applicable to this case. I see no reason why it should not be so. It is true that the Clause immediately preceding, Clause 7, applies to a mehal or a portion of a mehal held by cultivating proprietors "in puttedaree or byhacharee tenure, or the like;" and Clause 8 commences with the words "When it shall be determined to make a settlement of a mehal *of the above description* with one or more of the parcenars;" but even supposing that on the strength of these words we hold that Clause 8 is applicable only to such mehals as fall strictly within the description contained in Clause 7, still I am not prepared to hold that this mehal would be excluded. What the exact nature of the defendants' holding was prior to the resumption we are not informed, but I see no reason why their tenure should not fall under the very general words "or the like."

But I am not inclined to put so narrow a construction on Clause 8. I think it refers to any mehal settled under the provisions of Section 10 with one or more of the proprietors on behalf of the whole.

I think, therefore, that the decision of the Moonsiff was, in this respect, right, and that on that ground he was right in dismissing the suit. I think this appeal should be dismissed with costs.

It was admitted that this case (No. 2928) would be governed by the decision in special appeal No. 2927. I think therefore that it ought also to be dismissed with costs.

The 1st June 1870.

Present :

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Enhancement of rent—Sections 13 and 17 Act X. 1859—Pleadings—Presumptions.

Case No. 2394 of 1869 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 30th June 1869, *affirming a decision of the Deputy Collector of that District, dated the 20th May* 1864.

Thakoor Dutt Singh and others (Defendants) *Appellants,*

versus

Gopal Singh and others (Plaintiffs) *Respondents.*

Mr. G. C. Sconce and *Baboo Kishen Succa Mookerjee* for Appellants.

Mr. G. C. Paul for Respondents.

In a suit for a kubooleut at enhanced rates after notice under Section 13 Act X of 1859, where the defendants stood by and though raising a good many objections on other points, raised no question as to rates, their conduct and pleadings were held to afford a fair presumption of admission of the plaintiff's claim as to the rates sued for.

Semble (by Markby, J.) that when a landlord gives notice of enhancement to a tenant on the first of the grounds stated in Section 17 Act X of 1859, he treats him as a ryot having a right of occupancy.

Bayley, J.—THIS was a suit for a kubooleut at enhanced rates. The rates sued for ranged from 4 annas to rupees 2-8. The notice of enhancement was issued under Section 13 Act X of 1859, and the ground of enhancement was that the defendant paid at a lower rate of rent than those paid by the same class of ryots for lands with similar advantages in the places adjacent.

It may be observed that this case has been tried exactly 12 times, commencing on the 14th April 1864 and ending on this the 1st June 1870, and all the trials by the lower Courts have been subjects of special appeals. There have been four decisions by Division Benches of this Court, and now the case again comes up in special appeal.

To the claim of the plaintiff as above set forth, the defendants or their agent gave the following oral answer, *viz.*, that "from "the time of their ancestors before the sway "of the British Government, they have cul- "tivated 64 beegahs at 4 annas a beegah, on "two deeds of sale ; the notice issued by or- "der of the Judge has been reversed by or- "der of the High Court." The defendants also put in as evidence decisions of the Principal Sudder Ameen of the 15th September 1862 and 4th August 1863, and a copy of the decision of the 20th May 1831. All these documents admittedly referred to certain trials respecting the mokurureedars having kept the plaintiff out of possession, and the question was whether they were trespassers or had legal right to keep the plaintiff out of possession. There was not one word on the part of the defendants to the effect that the rate paid by him was not below the rate of rent prevailing in the neighbourhood.

The first Court, on the 20th May 1864, held that the defendants had proved that they paid at one uniform rent from the time of the Decennial Settlement, and also that the notice issued by the plaintiff was not in accordance with the provisions of Act X of 1859, and dismissed the plaintiff's suit.

There was then an appeal to the Judge who, on the 15th December 1864, held that the mokurruree nature of the defendant's tenure had been decided against them by the High Court in 1863. Intermediately, however, there was a remand by the Judge, and the case again went to the Deputy Collector, who, on the 20th February 1865, decreed the plaintiff's suit, being of opinion that it was held by this Court that there was no irregularity in the notice, and remarking that the defendants had not in their statement of objections raised any question as to the rates claimed by the plaintiff.

Again there was an appeal to the Judge, the issue before whom was simply as to the plaintiff's right to enhance, and the Judge also remarked that there was no objection taken before him as to the rates.

There was again a special appeal, and on the 19th June 1866 the case was again remanded to be tried only on the question of the mokurruree.

Again the Judge found in favor of the mokurruree.

Again there was a special appeal, and again a remand on the 20th February 1868. The Judge again heard the case on the 4th June 1868, holding that the defendants had not proved their case under Section 4 Act X of 1859, and remarking that no objection was taken before him as to the fairness of the rates.

Again there was a special appeal, and on the 25th March 1869, Mr. Justice Phear and myself were again obliged to send the case back to the Judge for re-trial. The Judge, by his decision of the 30th June 1869, has again held in favor of the plaintiff, and this decision is now the subject of the present special appeal.

It is needless to go into more details. Suffice it to say that the question of the notice was finally decided by this Court. The question of the mokurruree had also been found against the defendants. There remained then only two questions which have been very strongly contested by the learned Counsel Mr. Sconce and Baboo Kissen Succa Mookerjee for the appellants, *viz.*, *firstly*, that the question of rates ought to have been decided by the Lower Appellate Court as the plaintiff was bound to prove the precise rates specified in his plaint ; and *secondly*, that the mere absence of any

denial by the defendants, even if true, would not justify a decree in the plaintiff's favor, but that, in fact, they (defendants) had in their grounds of appeal before the Judge against the judgment of the Deputy Collector, Mr. Maclean, dated the 20th February 1865, taken an objection on that point.

As to the *first* of these objections, I do not think that under the circumstances the plaintiff was bound more clearly to prove the rates he sued for. The defendant's agent was present in Court. He made oral statements and put in documentary evidence, but neither in his oral statements nor in any document did he say a single word objecting to the rates sued for. It is true that in a case where the defendant is absent and has not appeared, or has appeared and contested the plaintiff's claim, the plaintiff is bound to prove his allegation; but in this case where the defendants stood by and did not raise a single question as to rates claimed by the plaintiff either by his written statement or the oral one of his agent, I do not think that anything but a fair presumption of admission of the plaintiff's claim by the defendants arises from the pleadings and conduct of the defendants. They raised a good many objections to the plaintiffs claim on other points, but did not say a single word as to the plaintiff's demand of the rate of rent being unfair and inequitable by reason of being higher (not than their alleged mokurruree) but than the prevailing neighbouring rates.

There is, it is true, a passage in the petition of appeal to the effect that "as to the "right of the plaintiff to enhance there has "been a complete contest and dispute, and "the decision of the Deputy Collector that "there was no objection in the matter of "rate is opposed to justice," but certainly this objection, if it really meant to take the shape that is now contended for, would have been raised in plainer words. The defendants might have plainly said that the rate claimed by the plaintiff was not fair and equitable as above prevailing rates, or that there was evidence to this effect produced or to be produced.

Again, the *issue* before the Judge and his decision thereupon related only to the plaintiff's *right to enhance*. No issue was asked as to the fairness of the rates sued for as the prevailing rates. No review was sought of the decision, and both the Deputy Collector and the Judge state in distinct words that no question was raised as to the rates. I cannot from such pleadings really suppose that any question was intended to be raised by the defendants as to the fairness of the rates claimed by the plaintiff as prevailing rates; especially as the defendants had ample opportunity to raise that plea, but had not done so till the case had been fully disposed of by the lower Courts. I do not think, therefore, that they ought now to be allowed to raise that objection.

There remains, then, another question as to whether the defendants' plea of mokurruree failing, they are not entitled to such rights as *occupancy* would give them. On this point, Mr. Paul for the special respondent, I understand, admits that they are, but he says that the question does not arise, and I may here add that from the year 1864 down to the present time, the question was never raised in this shape.

On the whole, I consider that all the grounds taken by the defendants fail, and I would therefore dismiss this special appeal with costs.

Markby, J.—I also think that this appeal must be dismissed, but not precisely upon the same grounds as those stated by Mr. Justice Bayley. I think it quite clear that for the purposes of this case we are bound to accept the concession made by the Counsel for the plaintiff that the defendants were sued in this case on the hypothesis that they were ryots having a right of occupancy; and I must say that that also entirely agrees with the view of the law which I have formed, although that matter has not been argued in this case, and Mr. Justice Bayley thinks otherwise. I should not venture to express a final opinion. It does, however, appear to me that when a zemindar comes in and gives notice of enhancement to a tenant on the first of the grounds stated in Section 17 Act X of 1859, which I understand is a ground held as a good ground in this case, he does treat him as a ryot having a right of occupancy, and I have great difficulty in seeing how otherwise a Court can compel a ryot to accept a lease or compel a zemindar to grant that lease. It is only on the hypothesis that a party has a right to hold the lands as having a right of occupancy that the Court can have any power to settle the terms on which he has a right to hold. Assuming then that point which has been conceded in this case, I should be inclined to think that Mr. Maclean was wrong in his judgment of the

20th February 1865 in not going into the question of rates. It is a matter which occurred so long ago that it is not easy to ascertain now how the parties stood, but treating as I think we are for the purposes of this case bound to treat, the defendants as having a right of occupancy, it was absolutely necessary for the plaintiff zemindar to establish the rate which he alleged was the fair and equitable rate before he could get a decree. It was no part of the defendant's case to disprove that fact. It was for the plaintiff to prove his allegation. If therefore the question was whether or not Mr. Maclean's judgment was wrong, I would probably say that it was. But this judgment was appealed against, and although the grounds of appeal were not so very artificially drawn, I think they sufficiently raised the question that Mr. Maclean was wrong in not going into the question of rates. The Judge, in disposing of this question on the 21st September 1865, states that as to the fairness of the rates the defendants took no exception. If by this the Judge meant that no objection as to rates was taken before him, therewas an end of the matter; but if, on the other hand, the Judge meant to say that it was not open to the defendants to contest the point and that Mr. Maclean's decision to that effect was right, I think I should not agree with him. But then the defendants came up here on appeal, and there can be no doubt the defendants were bound, if they thought that Mr. Pearson was wrong in taking the same view as Mr. Maclean, to have taken the objection clearly in this Court. Whether the ground was taken or not does not appear, but it makes no difference because the order of remand was distinct that it was on the question of the mokurruree title only, so that my view as to Mr. Maclean's judgment being right or wrong is wholly immaterial, because, supposing that he was wrong, the objection has long ago been over-ruled or abandoned. These are remarks upon the fourth and fifth grounds of this special appeal upon which alone we called upon Mr. Paul to answer. On the first, second, and third points we are clear that the order of remand has been rightly carried out.

The 1st June 1870.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Pleader of the High Court—Vakalatnamah.

In the matter of

Gopeenath Mudduck, *Petitioner.*

The acceptance of a vakalutnamah by a Pleader of the High Court should in all cases be unconditional.

Phear, J.—We think that we ought to assume for the purposes of this petition, that the statement of the pleader exhibits the true state of the facts, and upon that statement we are of opinion that the best course will be that the pleader should give up the 25 rupees, and the other small balance in his hand to the petitioner, and that the vakalutnamah should be cancelled. We will appoint another day for the hearing of the review and give the petitioner an opportunity of getting another pleader to represent him.

We also think that on this occasion, we ought to say that in our view the conditional acceptance of a vakalutnamah, such as occurred in the present instance, is a practice detrimental to the best interests both of the public and of the profession. According to the English system, there can be nothing of this sort. If once a Barrister accepts a brief he is bound to plead the cause of his client whether he is paid his fees or not. So also an Attorney, when he has taken a retainer to conduct a suit, must proceed as far as the money placed in his hands by his client will allow him, having regard to the necessary expenses of the suit. He can only abstain from proceeding on the ground that he is not furnished by his client with sufficient funds, and he must give timely notice that funds are needed.